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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 288

LEWIS L. STRAUSS,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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September 16, 1948.

SUBJECT INDEX

	PAGE
PETITION FOR A WRIT OF CERTIORARI	1
Statement	2
Jurisdiction	5
Question Presented	5
Reasons Relied upon for Allowance of the Writ	6
BRIEF IN SUPPORT OF PETITION	9
Opinions Below	9
Argument	9
1. The Circuit Court of Appeals improperly substituted for the Tax Court's finding of fact its own finding of fact	9
2. If the Circuit Court of Appeals wished to reject the Tax Court's finding, it should have remanded the cause	13
3. The decision below is in conflict with the decision of the Third Circuit Court of Appeals in *Nelson* v. *Ferguson*	14
4. The decision below improperly applies the principles laid down by this Court in previous cases	15
5. The decision below involves an important question of Federal law which has not been settled by this Court	19
Conclusion	20

TABLE OF CASES CITED

PAGE

Baker v. *Commissioner*, 115 F. (2d) 987 (C. C. A. 6th, 1940) 3
Blair v. *Commissioner*, 300 U. S. 5 (1937) 7, 18

Choate v. *Commissioner*, 324 U. S. 1 (1945) 11
Commissioner v. *Scottish American Inv. Co.*, 323 U. S. 119 (1944) 11
Commissioner v. *Sunnen*, 333 U. S. 59 (1948) 7, 17

Helvering v. *Eubank*, 311 U. S. 122 (1940) 7, 15
Helvering v. *Kehoe*, 309 U. S. 277 (1940) 11
Helvering v. *F. & R. Lazarus & Co.*, 308 U. S. 252 (1939) 11
Helvering v. *Rankin*, 295 U. S. 123 (1935) 13
Helvering v. *Taylor*, 293 U. S. 507 (1935) 13

Insurance & Title Guarantee Co. v. *Commissioner*, 36 F. (2d) 842 (C. C. A. 2d, 1929) cert. denied 281 U. S. 748 (1930) 3

Nelson v. *Ferguson*, 56 F. (2d) 121 (C. C. A. 3d, 1932) cert. denied, 286 U. S. 565 (1932) 7, 14

Wilmington Trust Co. v. *Helvering*, 316 U. S. 164 (1942) 11

STATUTES CITED

Judicial Code, § 240(a), as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U.S.C. § 347(a)) 5

Title 28, United States Code, section 1254(1), effective September 1, 1948 (Public Law 773, Act of June 25, 1948, 62 Stat. ——) 5

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Lewis L. Strauss, respectfully prays that a writ of certiorari be issued to review an order, judgment and decree of the United States Circuit Court of Appeals for the Second Circuit (now the United States Court of Appeals for the Second Circuit) entered June 4, 1948 (petition for rehearing filed June 18, 1948 and denied June 22, 1948) reversing the decision of the Tax Court, entered on July 11, 1947. A certified transcript of the record is furnished herewith in accordance with Rule 38, Par. 1, of the Rules of this Court.

Statement

The Commissioner of Internal Revenue determined deficiencies in the petitioner's income tax for the years 1938 and 1939 by including in the petitioner's income royalties paid upon an interest in the Kodachrome process of manufacturing color film, which royalties were reported by the petitioner's wife in her income tax returns for those years (R. 12, 41).

It was alleged in the petition filed in the Tax Court and admitted in the Commissioner's answer thereto and found by the Tax Court as a fact that "In 1935, the petitioner was the owner of an interest in the Kodachrome process of manufacturing color film" (R. 6, 15, 19).

It was stipulated by the parties that:

> "Prior to 1935, the petitioner rendered services to the New York and Foreign Development Corporation, a corporation formerly existing under the laws of the State of New York, in connection with the financing of a process known as 'Kodachrome' used in the manufacture of color film. For the rendition of said services, petitioner was entitled to receive a certain percentage of the royalties on said process. All royalties on such process (except certain flat royalties payable directly to the inventors and which are not here in question) were, pursuant to an assignment, dated November 1, 1930, by Messrs. Mannes and Godowsky, the inventors of such process, payable by the Eastman Kodak Company to Messrs. Kuhn, Loeb & Co., as Trustees. Kuhn, Loeb & Co. thereupon paid such royalties to those entitled to receive them." (R. 40).

In 1935 the petitioner assigned, absolutely and irrevocably, all his right, title and interest in the Kodachrome

process to his wife, the assignment being evidenced by a letter dated December 20, 1935, and notified Kuhn, Loeb & Co. of the assignment (R. 19, 20).

During 1938, the petitioner's wife received from Kuhn, Loeb & Co., pursuant to the assignment, $10,209.50 in royalties paid on the Kodachrome process, and during 1939 the petitioner's wife received $14,183.94 in such royalties (R. 41). It was alleged in the petition and admitted in the respondent's answer that such amounts were "royalties paid upon said interest in the Kodachrome process" (R. 6, 7, 15). All such royalties were paid for periods after 1935. The petitioner's wife included such amounts in her Federal income tax returns for the years 1938 and 1939 and paid income tax thereon (R. 41).

The Tax Court expunged the deficiencies in the petitioner's tax, as determined by the Commissioner, in so far as such royalties were concerned. In support of its decision, the Tax Court found:*

> "Aside from respondent's admission that petitioner owned an interest in the Kodachrome process, we think it clearly appears from the facts herein that petitioner acquired ownership of such interest in consideration for and in full payment of his services to New York and Foreign Development Corporation" (R. 28).

The Tax Court also found:*

> "In the instant case petitioner earned compensation for services rendered to New York and For-

*Statements made by the Tax Court in its opinion are properly considered as findings of fact. *Insurance & Title Guarantee Co.* v. *Commissioner*, 36 F. (2d) 842 (C. C. A. 2nd, 1929), cert. denied, 281 U. S. 748 (1930); *Baker* v. *Commissioner*, 115 F. (2d) 987 (C. C. A. 6th, 1940).

> eign Development Corporation, for which he was paid by the vesting in him of ownership of an interest in the Kodachrome process. This process was an income-producing asset and produced income in the form of royalties. Such royalties were not the earnings of petitioner and were not compensation for services rendered by petitioner. They were the increment of an investment in income-producing property. He assigned this property to his wife and she as the owner thereof received the royalties in question in the taxable years here involved by reason of her ownership of the property from which the royalties flowed" (R. 31).

On appeal, the Circuit Court of Appeals for the Second Circuit reversed the Tax Court (R. 73). Although the Circuit Court of Appeals did not in terms make new findings of fact, in effect it did so, for its opinion could not possibly have been reached nor could it stand on the basis of the facts found by the Tax Court. The Circuit Court of Appeals said that the petitioner had a "right to receive part of the royalties paid by the Eastman Kodak Company" (R. 64). The Circuit Court of Appeals also said that the petitioner did not receive for the services he rendered to New York and Foreign Development Corporation "any part of the Kodachrome process itself or any right to control the disposition of that process" (R. 65). There was no evidence in the record before that Court to indicate whether the petitioner had or had not any right to control the disposition of that process. The Circuit Court of Appeals further said:

> "* * * Rather, he obtained the enforceable promise of the owners of the process that he would be paid for his services a definite portion of the royalties

they had the right to receive from the Eastman Kodak Company" (R. 65).

The Circuit Court of Appeals concluded:

"* * * This taxpayer's right to receive royalties, we think, is indistinguishable from the right, which was considered in *Helvering* v. *Eubank* [311 U. S. 122 (1940)] * * *" (R. 65).

Jurisdiction

Jurisdiction of this Court is invoked under the Judicial Code, § 240 (a), as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. § 347 (a)), and alternatively under Title 28, United States Code, Section 1254(1), effective September 1, 1948 (Public Law 773, Act of June 25, 1948, 62 Stat. —). The date of the order, judgment and decree of the Circuit Court of Appeals for the Second Circuit to be reviewed was June 4, 1948, and a timely filed petition for rehearing was denied by that Court on June 22, 1948.*

Question Presented

The question presented is threefold:

(1) Was the finding of the Tax Court that the petitioner owned and assigned to his wife a property interest in the Kodachrome process, an income-producing asset, supported by substantial evidence and therefore a conclusive finding of fact which could not be reviewed by the

*The decision of the Court below also involved an affirmance of the decision of the Tax Court on an unrelated issue (the Polaroid Issue) as to which this petition for certiorari is not directed.

Circuit Court of Appeals and supplanted with an independent finding that the petitioner did not own any part of the Kodachrome process itself or any right to control the disposition of that process?

(2) Should the Circuit Court of Appeals have remanded the case to the Tax Court for a finding of fact on the precise nature of the interest in the Kodachrome process which the petitioner owned and assigned to his wife, once it determined that the Tax Court's original finding was not supported by the record?

(3) If the finding of the Circuit Court of Appeals was proper, should not that Court have determined, on the basis of its own finding, that the owners of the process turned over to the petitioner, in full satisfaction of his right to receive compensation for his past services, the right to receive (itself a property right) a definite portion of the royalties which such owners had the right to receive from Eastman Kodak Company, and that, therefore, the petitioner was not taxable, after the assignment in 1935 to his wife of what he then owned, on the amounts which she received, pursuant to that assignment, in 1938 and 1939?

Reasons Relied Upon for Allowance of the Writ

1. The Circuit Court of Appeals, in reversing the Tax Court's decision, rather than affirming it, or, in the alternative, remanding the cause, disregarded a conclusive finding of fact of the Tax Court, substituting therefor its own very different finding of fact, and so far departed from the accepted and usual course of judicial proceedings set by this Court for review of decisions of the Tax Court as to call for an exercise of this Court's power of supervision.

2. The Circuit Court of Appeals, even accepting its own construction of the facts, has rendered a decision in conflict with a decision of the Third Circuit Court of Appeals on the same matter, viz., the extent to which a taxpayer remains taxable on royalties paid to his wife pursuant to an assignment to her by the taxpayer of a right to a certain portion of the royalties from an invention. *Nelson* v. *Ferguson*, 56 F. (2d) 121 (C. C. A. 3rd, 1932), cert. den., 286 U. S. 565 (1932).

3. The Circuit Court of Appeals, even accepting its own construction of the facts, has decided a Federal question in a way in conflict with decisions of this Court, since it has improperly extended the principle of *Helvering* v. *Eubank*, 311 U. S. 122 (1940), so that it is in conflict with the principle of *Blair* v. *Commissioner*, 300 U. S. 5 (1937), and *Commissioner* v. *Sunnen*, 333 U. S. 591 (1948).

4. The Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court. Under the decision of the Circuit Court of Appeals, taxpayers throughout the United States are placed in a position of doubt as to whether a taxpayer may ever gratuitously assign an interest in property which he has received as compensation for services in a way which will shift to his assignee tax liability on income thereafter received. This Court should settle the question of whether, and to what extent, a taxpayer may be taxed on income irrevocably belonging to another following an assignment of property received by the taxpayer as compensation for services.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of

this Court, directed to the United States Court of Appeals for the Second Judicial Circuit, sitting at New York, New York, commanding said Court to certify and send up to this Court, on a date to be designated, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals had in this case, to the end that this case may be reviewed and determined by this Court; that the order, judgment and decree of the Circuit Court of Appeals be reversed; and that your petitioner be granted such other and further relief as may seem proper.

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BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the Tax Court (R. 17-37) is reported at 8 T. C. 1058. The opinion of the Circuit Court of Appeals (R. 62-72) is reported at 168 F. (2d) 441.

ARGUMENT

1. THE CIRCUIT COURT OF APPEALS IMPROPERLY SUBSTITUTED FOR THE TAX COURT'S FINDING OF FACT ITS OWN FINDING OF FACT.

The taxability of the Kodachrome royalties to the petitioner or to the petitioner's wife, who received them, depends upon an essential preliminary determination of the facts: What did the petitioner own and assign to his wife?

In the pleadings before the Tax Court the parties treated that question as one which was not in issue. The petitioner had alleged, and the respondent had admitted, that the petitioner in 1935 was the owner of an interest in the Kodachrome process of manufacturing color film, and that the amounts which were paid to the petitioner's wife in 1938 and 1939 were royalties upon such interest in the Kodachrome process. Being the owner of an interest, the petitioner was entitled, as the parties stipulated, to receive a certain percentage of the royalties on the Kodachrome process. In 1935 the petitioner assigned to his wife all his right, title and interest in Kodachrome, including the right to receive the royalties on the Kodachrome process.

Because the pleadings and the stipulations of fact disposed of the question, the petitioner introduced no evidence

before the Tax Court to support his ownership of an interest in the Kodachrome process.

Upon that record the Tax Court found, before undertaking consideration of the question whether the petitioner was taxable on the royalties paid to his wife subsequent to the assignment to her, that the petitioner owned, and assigned to his wife, a property interest in the Kodachrome process entitling him to a certain percentage of the royalties on such process.

The Circuit Court of Appeals, reversing the findings of the Tax Court, found that the petitioner did not own, prior to the assignment to his wife, any part of the Kodachrome process itself or any right to control the disposition of that process, but, rather, that he merely had the enforceable promise of the owners of the process that he would be paid for his services a definite portion of the royalties they had a right to receive from the Eastman Kodak Company. The record is clear that the royalties in question were paid to the petitioner's wife by Eastman Kodak Company through Kuhn, Loeb & Co., as Trustees (R. 18, 40).

It may be admitted that, as an original proposition, the petitioner might have owned (1) an undivided interest in the Kodachrome process (as found by the Tax Court) or (2) an undivided interest in the Eastman Kodak Company royalty contract, i.e., the enforceable promise of the owners of the process that the petitioner would be paid (by Eastman) a definite portion of the royalties they had a right to receive from Eastman (as stated by the Circuit Court of Appeals).

It was the function of the Tax Court to determine which of those alternative interests the petitioner had before

the assignment of his rights to his wife, on the basis of the record before that Court, and prior to a determination of the income tax consequences to the petitioner.* In making the finding that the petitioner owned a property interest in the Kodachrome process which entitled him to a percentage of the royalties received from such process, the Tax Court conclusively determined a question of fact, since that finding was fully supported by the pleadings in the record before the Tax Court. Accordingly, the Circuit Court of Appeals could review the Tax Court's decision as to the petitioner's tax liability only on the basis of accepting the Tax Court's finding that the petitioner owned and assigned to his wife an interest in the Kodachrome process. *Commissioner* v. *Scottish American Inv. Co.*, 323 U. S. 119 (1944); *Wilmington Trust Co.* v. *Helvering*, 316 U. S. 164 (1942); *Helvering* v. *Kehoe*, 309 U. S. 277 (1940); *Helvering* v. *F. & R. Lazarus & Co.*, 308 U. S. 252 (1939).

Indeed, the error of the Circuit Court of Appeals goes beyond its unwarranted review of a conclusive finding of the Tax Court. The Circuit Court of Appeals substituted a finding of its own which is unsupported by anything in the record. There was nothing in the record before that Court to indicate whether the petitioner had or had not any

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*In *Helvering* v. *F. & R. Lazarus & Co. Inc.*, 308 U. S. 252 (1939), this Court held that the question of whether a transaction was a sale or mortgage was a question of fact, conclusively determined by the Tax Court if supported by substantial evidence; and in *Choate* v. *Commissioner*, 324 U. S. 1 (1945), this Court held similarly with respect to whether a transaction was a sale or a lease.

right to control the disposition of the Kodachrome process nor was there anything in the record to indicate, contrary to the pleadings, that, rather than an interest in the process itself, the petitioner had only the enforceable promise of the owners of the process that he would be paid a definite portion of the royalties they had a right to receive.

What the Circuit Court of Appeals failed to note, moreover, was that *on the record presented to the Tax Court*, Lewis L. Strauss, the petitioner herein, was the *only* person in the world who had an interest in the Kodachrome process in 1935, the year he assigned it to Mrs. Strauss. The other "owners of the process", referred to by the Circuit Court of Appeals, if any, are not named. Presumably, New York and Foreign Development Corporation, which had financed the Kodachrome process, at one time owned a part of it. Presumably, also, Messrs. Mannes and Godowsky, the inventors of that process, at one time owned a part of it. However, on the record before the Tax Court, the only possible finding of ownership of the process, without speculation on facts outside the record, was that the petitioner owned an interest in the Kodachrome process in 1935, prior to the assignment to his wife. It was only by presuming facts outside the record that the Circuit Court of Appeals could find that other unnamed owners of the process merely gave the petitioner a promise that he would be paid by Eastman a part of their royalties.

2. IF THE CIRCUIT COURT OF APPEALS WISHED TO REJECT THE TAX COURT'S FINDING, IT SHOULD HAVE REMANDED THE CAUSE.

If the Circuit Court of Appeals was dissatisfied with the finding of the Tax Court on the ground that it was not substantially supported by the record, then the record was inadequate for a final decision of the legal question involved and the proper action of the appellate Court should have been to remand the cause to the Tax Court. *Helvering* v. *Rankin,* 295 U. S. 123 (1935); *Helvering* v. *Taylor,* 293 U. S. 507 (1935). The action taken by the Circuit Court of Appeals in making its own finding contrary to the pleadings and to the Tax Court's finding was highly prejudicial to the petitioner. On the pleadings, the question of whether he owned an interest in the Kodachrome process, or owned something else, was not in issue. By disregarding the admissions of the pleadings, and making a contrary finding of fact, the Circuit Court of Appeals has effectively denied to the petitioner a proper opportunity to present detailed evidence in support of the pleadings to establish the fact that he had a property interest in the Kodachrome process, as distinguished from the enforceable promise of the owners of the process that he would be paid a definite portion of the royalties they were entitled to receive. The appellate Court having concluded for some reason that the admissions of the pleadings, and the findings of the Tax Court were wrong, it should have remanded the cause to the Tax Court with instructions to receive further evidence and to make new findings of fact on the precise nature of the property interest that the petitioner owned and assigned to his wife.

3. THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS IN *NELSON* V. *FERGUSON*.

In *Nelson* v. *Ferguson*, 56 F. (2d) 121 (C. C. A. 3d, 1932) cert. den., 286 U. S. 565 (1932), the taxpayer, while in the service of his employer, obtained a patent on an invention having to do with the business of his employer. He assigned the patent to his employer in return for one-third of the net profit realized from the invention. Thereafter, the taxpayer assigned to his wife his rights to the profits from the invention. The Third Circuit Court of Appeals held that the contractual promise of the taxpayer's employer to pay one-third of the profits from the invention, which the taxpayer assigned to his wife, was a property right and, accordingly, the taxpayer was no longer taxable on the profits paid to his wife after the assignment.

In the instant case the Circuit Court of Appeals found that the petitioner had the contractual promise of the owners of the process that he would be paid a definite portion of the royalties from the process, but held that the assignment of that contractual promise to his wife did *not* relieve him of tax liability on the royalties paid to his wife.

There is, therefore, a clear conflict between the two Circuit Courts of Appeals as to whether a contractual right to a portion of the royalties or profits from an invention is income-producing property which, when completely and irrevocably assigned, shifts the income tax liability to the assignee.

4. THE DECISION BELOW IMPROPERLY APPLIES THE PRINCIPLES LAID DOWN BY THIS COURT IN PREVIOUS CASES.

In support of the decision below, the Circuit Court of Appeals cited its belief that the instant case was indistinguishable from *Helvering* v. *Eubank,* 311 U. S. 122 (1940), and was, therefore, controlled by the decision of this Court in that case.

The instant case is not at all like the *Eubank* case. That is clearly so if the Tax Court's finding that the petitioner owned and assigned to his wife a property interest in the Kodachrome process was conclusive. It is so even if the Circuit Court of Appeals acted properly in finding that the taxpayer received the enforceable promise (itself a property interest) of the owners of the process that he would be paid a definite portion of the royalties payable by the Eastman Kodak Company.

In the *Eubank* case the taxpayer assigned to a corporate trustee the contractual obligation of his *employer* to pay him renewal commissions, on premiums to be paid by the policyholders in the future, which commissions the taxpayer had earned as an insurance agent. The payments which were later made by the employer, pursuant to his contractual obligation to the employee, directly to the trustee were held to be taxable to the taxpayer-employee. The payments retained their character as compensation. They were made by the employer in discharge of its contractual obligation *to compensate* the employee.

In other words, in the instant case even the Circuit Court of Appeals admits that the petitioner had a "right to receive royalties" paid by the Eastman Kodak Company (R. 65).

In the *Eubank* case the taxpayer did not have a right to receive premiums paid by the policyholders to his employer. He merely had a right to receive "commissions" measured by the amount of premiums which might be paid, i.e., a right to receive compensation. As this Court said in the *Eubank* case (p. 125):

> "No purpose of the assignments appears other than to confer on the assignees the power to collect the commissions, which they did in the taxable year. The Government and respondent have briefed and argued the case here on the assumption that the assignments were voluntary transfers to the assignees of the right to collect the commissions as and when they became payable, and the record affords no other basis."

In the instant case the Circuit Court of Appeals found that the petitioner obtained the enforceable promise of the owners of the process that he would be paid for his services (rendered to New York and Foreign Development Corporation) a definite portion of the royalties the owners had a right to receive from the Eastman Kodak Company (R. 65) and recognized that in 1935 the petitioner had a right to receive part of the royalties paid by the Eastman Kodak Company (R. 64). That Court must therefore have regarded the enforceable promise of the owners of the process as having been executed by the assignment to the petitioner of a part of the Eastman contract to pay royalties. Accordingly, unlike the *Eubank* case where the right assigned by the taxpayer was the promise of his employer to pay commissions, in the instant case the assigned right was the right to receive part of the royalties paid by the Eastman Kodak Company. Therefore, even on the view of the facts taken by the Circuit Court of Appeals,

the assigned promise was that of Eastman and not that of the employer, and what the petitioner obtained (and assigned to his wife) was part of an income-producing contract. He did *not* assign to his wife recurrent compensation payments made by his employer, which were the subject of the assignment in the *Eubank* case.

The employer in the instant case discharged its obligation to pay the petitioner for his services by giving him the right to receive a portion of the royalties that were payable by Eastman. The petitioner's compensation was the receipt of that right, not the payments thereafter made (by one other than the employer) pursuant thereto. In the *Eubank* case, the obligation of the employer to pay compensation was continuing and was discharged only as the employer made the payments pursuant to its contractual obligation.

A tabular comparison of the *Eubank* case with the instant case shows the complete dissimilarity of the two:

	The Eubank Case	**The Instant Case**
Services rendered to:	Insurance company.	New York and Foreign Development Corporation.
When payment of compensation made:	In current taxable year.	Not in current taxable year, but in the year 1935 or earlier.
Payment sought to be taxed made by:	Employer.	Eastman Kodak Company through Kuhn, Loeb & Co., trustee (neither was the employer).
Payment sought to be taxed made as:	Commissions for services.	Royalty on an assigned property interest.
Employer's obligation to pay compensation:	Continuing.	Discharged in 1935, or earlier.

In other words, even on the theory of the Circuit Court of Appeals, the petitioner received as compensation an as-

signment by his employer of a promise of a third party, which assignment discharged the obligation of his employer to pay him compensation. The payments made pursuant to that assignment were not made as compensation for services but by the Eastman Kodak Company as royalties, all obligation to pay compensation having been discharged in 1935 or earlier. The right which the petitioner had to receive his portion of those royalties from Eastman was itself a property right which, when in turn assigned completely and irrevocably by the petitioner to his wife, relieved him, under the decision of this Court in *Blair* v. *Commissioner*, 300 U. S. 5 (1937), of further income tax liability on income arising from that right.

Moreover, the Circuit Court of Appeals, in deciding the instant case, completely ignored the rules recently laid down by this Court in *Commissioner* v. *Sunnen*, 333 U. S. 591 (1948), where this Court granted certiorari in order to decide questions of importance in administering the Internal Revenue laws. In that case, this Court said (at p. 604) that in determining who is taxable after a transfer of income-producing property (a royalty contract) the crucial question is:

> "* * * whether the assignor retains sufficient power and control over the assigned property or over the receipt of the income to make it reasonable to treat him as the recipient of the income for tax purposes."

As is clear from the record in this case, the petitioner did not retain any control over either the assigned property or the receipt of the income after his complete and irrevocable assignment to Mrs. Strauss in 1935.

5. THE DECISION BELOW INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT.

Under the decision of the Circuit Court of Appeals, taxpayers throughout the United States are placed in a position of doubt as to whether a taxpayer may ever gratuitously assign a right which he has received as compensation for services without remaining taxable on the income from that right received by his assignee. Because of the drastic effect of holding a taxpayer liable for the tax on income which he cannot receive or obtain, because it irrevocably belongs to another, the principles under which such a result is reached should be defined as clearly as possible for the guidance of the many taxpayers affected.

No court has held, to our knowledge, before the decision in the instant case, that the promise of a third party, other than the employer, received in discharge of the obligation of the employer to pay compensation, can not be assigned gratuitously by the taxpayer so as to make the assignee the owner, and thus responsible for the tax on any income received. Nor has any court held that an interest in an invention received as compensation for services cannot be so assigned. The implications of the decision of the Circuit Court of Appeals are manifold and that Court did not articulate any standards for guidance as to the extent of the implications of its decision.

If the principle that a taxpayer may be taxed on income irrevocably belonging to another is to be extended to the broad field of the assignment of property received as compensation for services, we respectfully submit that the application of that principle in such circumstances should be settled as the result only of a decision of this Court.

Conclusion

The cases in which an individual is taxable on income which he does not and cannot receive are very few, and for the most part are governed by specific provisions in the Internal Revenue Code. The hardship upon the taxable individual in such a case is great. Additional cases should not be added to this exceptional category, therefore, unless the plain language of the statute requires it.

The decisions of this Court, as well as the long history of the Code, point the other way in this case. No proposition is better established than that income from property is taxable to the owner of such property. The pleadings and the Tax Court's findings of fact established that Mrs. Strauss and not the petitioner was the owner of the interest in the Kodachrome process which produced the income here involved. Consequently, the income was taxable to her, not to the petitioner.

It is submitted, therefore, that this Court should issue a writ of certiorari to review the erroneous decision of the Circuit Court of Appeals in this case.

Respectfully submitted,

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